IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION, LOCAL 1729,	)	
Plaintiff,	)	Case No. 2:15-cv-00806
v.	)	Judge Terrence F. McVerry
FIRST GROUP AMERICA INC. and FIRST STUDENT, INC.,	)	*Electronically Filed*
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Amalgamated Transit Union, Local 1729 ("Local 1729") argues in a supplemental memorandum that the supremacy doctrine does not bar this action to confirm an arbitration award because neither the National Labor Relations Board ("NLRB" or "Board") nor the arbitrator decided a representational issue and that the back pay remedy in the award may in any event be enforced. For the reasons below, these arguments are unpersuasive.

I. ARGUMENT

A. The Supremacy Doctrine Applies to Protect a Board Decision Whenever a Conflict Exists Between an Arbitration Award and a Board Decision Regarding Unit Placement of Employees

Local 1729 asserts that defendants cited only cases involving application of the supremacy doctrine to conflicts between an arbitration award and a Board order arising in a Section 10(k) proceeding. (Doc. 37, pp. 3-4) That is incorrect. In their initial brief opposing Local 1729's motion, defendants cited *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261 (1964), which gave rise to the supremacy doctrine and did not involve a Section 10(k) proceeding. Defendants also cited *Chauffeurs, Teamsters and Helpers Local 776 affiliated with*

Int'l Bhd. of Teamsters, AFL-CIO v. N.L.R.B., 973 F.2d 230, 231-34 (3d Cir. 1992) (hereinafter "*Local 776*"), in which the Third Circuit held that an arbitration award in conflict with a Board unit clarification decision could not be enforced. (Doc. 23, p. 8)

More important, the Supreme Court's statement in *Carey*, 375 U.S. at 272, that the Board's authority is superior in matters "involving work assignment or one concerning representation" indicated that the doctrine is not limited to Section 10(k) disputes. The Third Circuit has made clear in *Local 776* and other cases that the supremacy doctrine extends well beyond conflicts between arbitral decisions and Board orders in jurisdictional dispute cases. *See Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, AFL-CIO v. N.L.R.B.*, 1 F.3d 1419, 1426-27 (3d Cir. 1993) (hereinafter "*Roofers*") (citing *Local 776* and noting the Third Circuit applies supremacy doctrine principles in response to both 10(k) proceedings and representational matters); *Eichleay Corp. v. Sheet Metal Workers Int'l Ass'n*, 944 F.2d 1047, 1056 (3d Cir. 1991) ("[i]f an NLRB determination on the definition of the proper bargaining unit conflicts with an arbitration award, the NLRB decision will prevail").

Other circuits have reached the same conclusion. *See* cases cited in Section III, A.3 of defendants brief in opposition to plaintiff's motion (Doc. 23, p. 8); *Local 7-210, Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Union Tank Car Company*, 475 F.2d 194 (7th Cir. 1973) (refusing to enforce arbitration award requiring employer to 'make whole' plaintiff-union employees after the Board determined employees were properly in a unit represented by another union) (hereinafter "*Union Tank")*.

B. The Supremacy Doctrine Applies Because the Arbitrator's Award of New Woodland Hills Driver and Monitor Work to Local 1729 Conflicts with the Board's Determination That Such Work Was an Expansion of the Teamster Unit

Local 1729 also argues the supremacy doctrine does not apply because this case does not

presents a "representational" issue -- specifically, according to Local 1729, because the Board found the new Woodland Hills work an expansion of the Teamsters unit (not a representation question that would result in an election), and because the arbitration award addressed only application of the Local 1729-First Student contract's recognition clause (not competing union representational claims), the supremacy doctrine does not apply. (Doc. 37, pp. 4-8) This contention misconstrues the supremacy doctrine and its application.

The issue is whether the Board's and arbitrator's decisions disagree on whether "the employees involved in the controversy are members of one bargaining unit or another[.]" *Carey*, 375 U.S. at 272. If so, the Board's ruling receives primacy. Local 1729's contention ignores the point above, which is that the supremacy doctrine is not confined to specific types of Board proceedings or proceedings in which the Board finds a "question concerning representation," but applies whenever Board and arbitral decisions are in conflict about unit placement of employees.

Here, the Board decision found the new Woodland Hills work to be an expansion of the Teamster unit, which placed the work Local 1729 claimed as its own in the arbitration with the Teamsters. Regardless of whether a representation election was directed among drivers and monitors, this was a determination on where unit the work belonged. Although Local 1729 argues that the arbitral decision determined no representational issue because it only interpreted the Local 1729-First Student agreement's recognition clause, it did award the new Woodland Hills work to Local 1729 unit employees. Thus, it addressed placement of the same unit work as the Board's decision, coming to the opposite result.

Because enforcement of the arbitration award would require First Student to recall and "make whole" employees represented by Local 1729, whom the Board determined were properly part of the Teamsters' unit, the supremacy doctrine protects the Board's determination and

requires dismissal of Local 1729's motion.

C. First Student Cannot Be Liable for a Back Pay Award Pursuant to an Arbitration Award that Conflicts with the Board's Decision

Local 1729 asserts the Board's decision and the arbitration award are not in conflict because, although the Board found the work in question belonged to the Teamsters unit, "the arbitration award did not decide who should represent the employees," and thus the back pay award to Local 1729 members can enforced. (Doc. 37, pp.7-9)

This is a fiction. The arbitral award found, based on Local 1729's status as bargaining representative under the recognition clause in the Local 1729-First Student agreement, that First Student violated that clause by assigning the new Woodland Hills work to Teamsters employees. Arbitrator Miles said:

> ... the work the Teamsters followed to the Frankstown Terminal is that the work that was relocated when the Rankin facility was closed in 2013. That work did not include the 59 additional routes secured by [First Student] from Woodland Hills in 2014. ... The 59 additional routes was new work and should have been assigned in accordance with the recognition clause set forth in the Agreement.

(Doc. 1-4, p. 14)

Further, the Third Circuit rejected exactly this type of argument in *Roofers*, 1 F.3d at 1427, where the union argued that its Section 301 action seeking damages did not conflict with a Board ruling "so long as it is not seeking the work itself." The court disagreed, noting the distinction "between seeking the work and seeking payment for the work is ephemeral" and holding that "a Board ruling on a representational issue [protects] the employer from liability for damages for breach of a collective agreement as long as the employer's actions were consistent with the Board's decision." *Id.* at 1427-28. *See also Union Tank*, 475 F.2d at 195-99 (union representing employees transferred to new plant with pre-existing union obtained arbitration

award, requiring employer to apply its collective bargaining agreement to all plant employees, including those represented by pre-existing union, and to make its members whole for lost wages and benefits, but after NLRB found transferred employees properly in pre-existing unit, union renounced claim for representative status and tried to enforce only the make-whole remedy, which the court found conflicted directly with the NLRB ruling and was not separable from its demand for representative status, noting that "contractual rights cannot exist separately and apart from the union's right to represent the unit").

II. CONCLUSION

Defendants respectfully requests the Court deny plaintiff Amalgamated Transit Union, Local 1729's motion for judgment on the pleadings.

Respectfully submitted,

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Dated: March 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2016 a true and correct copy of the foregoing Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings was filed, using the Western District of Pennsylvania's CM/ECF system through which this document is available for viewing and downloading, causing a notice of electronic filing to be served upon the following counsel of record:

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